(2)

No. 88-129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY A. COOPER, D.O.,

Petitioner

v.

BERNARD J. AMSTER, D.O., and
DELAWARE VALLEY MEDICAL CENTER, and
MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and
METROPOLITAN HOSPITAL, PARKVIEW DIVISION,

Respondents

BRIEF IN OPPOSITION FOR RESPONDENTS

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit
No. 87-1077, C.A. No. 85-6861

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QUESTION PRESENTED

1. Whether Petitioner's sole allegation that respondents had an anti-competitive motive in formulating and implementing admittedly objective criteria, which determined the eligibility of staff physicians for inclusion on an emergency room referral list, is sufficient to sustain a Section 1 Sherman Antitrust Act cause of action where unequivocally, the criteria, on their face and as applied, were pro-competitive, legitimate, and reflected a reasonable hospital policy.

LIST OF PARTIES

The interested parties in this matter are limited to petitioner, Harry A. Cooper, D.O. and respondents, Bernard J. Amster, D.O. and Delaware Valley Medical Center.

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STATEMENT OF THE CASE

Harry A. Cooper, D.O. (hereinafter "petitioner") instituted this lawsuit based upon the denial of his request to be placed on the emergency room rotation list at Delaware Valley Medical Center (hereinafter "respondent Delaware Valley").

Historically, petitioner completed his orthopedic surgical residency at respondent Delaware Valley on June 30, 1983. Thereafter, he immediately applied for and was granted, effective July 19, 1983, medical staff membership and concomitant clinical privileges at Delaware Valley. (A. 330). After enjoying medical staff membership and concomitant clinical privileges for approximately two years, petitioner requested in February or March of 1985 that he be placed on the emergency room rotation list. Importantly, irrespective of the decision on petitioner's request for inclusion on said list, petitioner continues to enjoy medical staff membership and clinical privileges.

In February 1983, prior to petitioner's completion of his residency and more than two years prior to his request for inclusion on the emergency room rotation list, petitioner as well as all medical staff members were duly advised that, for quality of care reasons, a physician would have to satisfy four criteria to be placed on said list. The criteria consisted of the following:

1. Completion of an AOA approved internship and AOA approved residency;

2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;

3. Status as an active staff physician for at least three (3) years; and,

4. Admission to the orthopedic service of at least 50 patients per year from the physician's practice. (A. 322, 325).

Petitioner did not satisfy the required criteria and was so advised on April 9, 1985 by the Medical Executive Committee of respondent Delaware Valley. (A. 36). The petitioner subsequently pursued his administrative remedies at respondent Delaware Valley (A. 395, 397-400) and filed the instant lawsuit.

Petitioner instituted the instant lawsuit by filing a Complaint against Bernard J. Amster, D.O., (hereinafter "respondent Amster"), Chairman of the Department of Surgery and Chief of the Division of Orthopedic Surgery, and respondent Delaware Valley (collectively "respondents") as well as Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D. and Metropolitan Hospital-Parkview Division (hereinafter "co-defendants"). Plaintiff's Complaint asserts a federal claim under §1 of the Sherman Antitrust Act, 15 U.S.C. §1, and pendent state law claims for tortious interference with prospective contractual relations, promissory estoppel, fraud and misrepresentation, breach of implied contract and punitive damages.

Respondents and co-defendants filed separate Motions to Dismiss plaintiff's Complaint. The United States District Court for the Eastern District of Pennsylvania, (per J. Ditter), entered an Order severing the plaintiff's claims against respondents from those against co-defendants. (A. 394). The court subsequently dismissed plaintiff's claims against co-defendants. (A. 403, published as *Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986)). Plaintiff did not appeal this Order.

Respondents attached supplemental materials to their Motions to Dismiss. (A. 42-347). In accordance with Fed. R. Civ. P. 12(b), Judge Ditter filed an Order declaring he would construe respondents' Motions to Dismiss as a Motion for Summary Judgment. (A. 395). The Court, however, did not articulate in its Opinion whether it considered the supplemental materials in reaching its decision.[1]

Judge Ditter, in an Order without Memorandum, dismissed petitioner's claims against respondents and incorporated by reference the reasoning expressed in his Opinion and Order dismissing the claims against the three co-defendants. (A. 403). The Court dismissed plaintiff's claims against co-defendants pursuant to Fed. R. Civ. P. 12(b)(1), because his claims were frivolous and not ripe for adjudication, and pursuant to Fed. R. Civ. P. 12(b) (6) for frivolousness. The Court declined to exercise pendent jurisdiction over the plaintiff's state

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1. Although Judge Ditter, in a Pretrial Order, stated that he would consider Respondents' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12 as a Motion for Summary Judgment, the District Court did not expressly state in its opinion that it was in fact granting summary judgment. The United States Court of Appeals for the Third Circuit appears to have assumed that the District Court granted summary judgment for Respondents. Inasmuch as the District Court and the Court of Appeals found Petitioner's Sherman Act cause of action to be deficient on legal grounds, the distinction has no significance.

claims. Although it is unclear whether defendants' Motions to Dismiss, in fact, were converted into a Motion for Summary Judgment, Judge Ditter's decision was proper and appropriate whether based upon Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. Plaintiff subsequently appealed the District Court's Order.

The United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment by way of a Memorandum Opinion per Circuit Judges Aldisert, Weis and Greenberg. (Petitioner's Appendix at p. A-5). The Court of Appeals noted that the petitioner was denied placement on the emergency room referral list based upon objective criteria governing the eligibility of physicians for this list. The Court reasoned that, because the standards focus on a physician's years of experience and practice, they are relevant to professional competence. The Court observed that the petitioner has not pointed to anything suggesting that the criteria are not based upon a perfectly legitimate and reasonable hospital policy, particularly in light of respondent medical center's potential for vicarious liability under state law. Thus, the Third Circuit held that the petitioner did not establish a cause of action under the antitrust laws. Petitioner subsequently filed a Petition for Panel Rehearing and for Rehearing En Banc, which was denied by Order of the United States Court of Appeals for the Third Circuit dated and entered on April 21, 1988. (Petitioner's Appendix at A-8). Petitioner subsequently filed the instant Petition for Writ of Certiorari.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF A WRIT OF CERTIORARI

Petitioner's thesis, however cogent it may seem at first blush, attempts to persuade this Court that, standing alone, evidence of a purported conspiracy is sufficient to sustain a cause of action pursuant to §1 of the Sherman Antitrust Act. Petitioner's thesis, as the lower courts recognized, is fatally flawed and improperly ignores years of antitrust decisional authority. In short,

although petitioner goes to extreme lengths to illustrate an alleged conspiracy (i.e., conspiratorial motive), petition does not address the additional equivocal requirements that there be evidence that the alleged conspiracy produce adverse effects upon the competition generally, that the challenged conduct (i.e., emergency room criteria, *supra*, at page 2), was improper or illegal, *and* that petitioner was injured as a proximate result of said conduct.

Moreover, petitioner has not articulated any viable reasons under Rule 17, which governs such review, for the grant of a Writ of Certiorari. Indeed, an analysis under that Rule indicates that a Writ of Certiorari should not be granted. The United States Court of Appeals for the Third Circuit has *not* rendered a decision in conflict with any other Federal Court of Appeals, has *not* departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, and has *not* decided an important question of federal law that is unsettled by this Court or decided such a question in conflict with applicable decisions of this Court. *See Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

In his petition for Certiorari, petitioner asserts that the District Court and Court of Appeals improperly granted summary judgment. He contends that allegations in the pleadings and exhibits[2] demonstrate a

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2. Petitioner asserts that the Complaint in this case and an exhibit entitled "Statement on Behalf of Harry A. Cooper, D.O." create a genuine issue of material fact as to the respondents' alleged anti-competitive motive in formulating and applying the criteria for the inclusion of practitioners on the Emergency Room Referral Roster. Petitioner asserts that the Court of Appeals ignored the Complaint and this exhibit. He states that neither the District Court nor the Court of Appeals made any statement as to whether it was considering any of the exhibits. Petitioner's reliance on these documents, however, is misplaced.

First, merely because the Courts did not mention the exhibits, does not indicate that they ignored them. There is no rule requiring

genuine issue of material fact as to the existence of an improper anti-competitive motivation for adoption of the admittedly objective criteria governing the eligibility of physicians for inclusion on the emergency room rotation roster, criteria which, on their face, express a legitimate

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NOTES *(Continued)*

that a court specify each and every exhibit it considers in determining a Motion for Summary Judgment. Petitioner does not cite any authority for this proposition and it is entirely counter-intuitive.

Second, the exhibits upon which petitioner relies were improper. Rule 56(e) of the Federal Rules of Civil Procedure emphasizes that a party may not rest on the mere allegations in a pleading, but must present evidentiary matter showing there is a genuine issue of material fact. The Rule states:

Where a Motion for Summary Judgment is made and supported as provided in this Rule, *an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(e) (emphasis added).

Additionally, the attorney statement, drafted and signed by Petitioner's counsel, is insufficient. Courts emphasize that such attorney statements containing alleged facts not within the attorney's personal knowledge are not sufficient to create a genuine issue of material fact and preclude summary judgment. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 896 & n.4 (1950), *overruled on other grounds, Lear, Inc. v. Atkins*, 395 U.S. 653 (1968); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162 (W.D. Mo. 1985); *Nakao v. Rushen*, 580 F.Supp. 718 (N.D. Cal. 1984), *vacated on other grounds*, 766 F.2d 410 (9th Cir. 1985).

Finally, consideration of the aforementioned exhibits would have been unnecessary and irrelevant. As stated above, the opinions of the District Court and Court of Appeals do not clearly demonstrate whether Respondents' Motions were decided pursuant to Federal Rule of Civil Procedure 12 or Federal Rule of Civil Procedure 56. If the Motions were decided under Rule 12, the exhibits would be properly excluded from consideration. Even if, however, the Motions were decided pursuant to Rule 56, the decisions were based on legal as opposed to factual grounds and thus consideration and discussion of the exhibits would have been unnecessary.

and reasonable hospital policy. Even if, *arguendo* petitioner's assertions are accepted by the Court, however, they are not dispositive of the propriety and appropriateness of the decisions of the Court of Appeals and District Court in this case. Even if, *arguendo,* petitioner did establish a genuine issue of material fact as to the existence of an anti-competitive motive underlying the adoption of the criteria, which respondents steadfastly deny, summary judgment was proper and appropriate inasmuch as petitioner has not established any genuine issue of material fact as to the existence of any of the other essential elements of a antitrust cause of action under §1 of the Sherman Act. Specifically, petitioner has not presented any evidence or facts to show a conspiracy, an unreasonable restraint of trade or an antitrust injury. Moreover, petitioner has not challenged the legitimacy of the criteria or the pro-competitive and reasonable hospital policy furthered by the criteria. The reasoning and decisions of the District Court and the Court of Appeals were correct and appropriate. Thus, the grant of a Writ of Certiorari by this Court is unnecessary.

The United States Supreme Court, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), articulated the standard to be applied in deciding Motions for Summary Judgment in federal antitrust cases. The Court observed that, to survive a Motion for Summary Judgment, the responding party must establish that there is a genuine issue of material fact as to whether the moving party entered into an illegal conspiracy that caused him to suffer a cognizable injury. *Id.* at 1355-56. The Court emphasized that the responding party must show more than a conspiracy in violation of the antitrust laws, he must show that he sustained injury from the illegal conduct. *Id.* at 1356. In addition, according to the Court, the issue of fact must be "genuine". It is not sufficient that the responding party simply show doubt as to the material facts, he must affirmatively demonstrate with specific facts that there

is a genuine issue for trial. *Id.* Although the Court noted, on summary judgment, inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the Motion, it stated that the antitrust laws limit the range of permissible inferences from ambiguous evidence in any §1 case. *Id.* at 1356-57. Thus, conduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support the inference of antitrust conspiracy. *Id.* at 1357.

In order to establish a § 1 Sherman Act violation, a plaintiff must establish four elements: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant markets; (3) that the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. *See Martin B. Glauser Dodge Co. v. Chrysler,* 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Tunis Bros. Co. v. Ford Motor Co.,* 763 F.2d 1482, 1489 (3d. Cir. 1985); *Pontius v. Children's Hospital,* 552 F. Supp. 1352, 1373 (W.D. Pa.1982). Petitioner has failed to establish a genuine issue of material fact as to any of these essential elements of a Sherman Act claim.

1. Petitioner Has Not and Cannot Establish the Existence of any Contract, Combination or Conspiracy

Petitioner alleges that respondent Amster, as a corporate officer and/or employee of respondent Delaware Valley, acting for his own interest and outside the interest of respondent Delaware Valley conspired with respondent Delaware Valley to unlawfully preclude petitioner's inclusion on the emergency room rotation list in violation of §1 of the Sherman Antitrust Act (A. 13).

It is well-settled that §1 of the Sherman Antitrust Act does not preclude "wholly unilateral conduct". *Copperweld Corp. v. Independent Tube Co.*, 467 U.S. 752, 770-71 (1984). Therefore, in order to establish a violation of §1, a plaintiff must prove that two or more distinct entities agreed to take action against the plaintiff. *Weiss v. York Hospital*, 745 F.2d 786,813, (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1777 (1985).

The general rule is that officers and/or employees of the same firm do not provide the plurality of actors imperative for a §1 conspiracy. *See, e.g., Copperweld Corp. v. Independent Tube Co.*, 467 U.S. at 769. A narrow exception to this rule exists if the officer and/or employee is found to be acting for his own interest, and outside the interest of the corporation. *Copperweld, supra.*, 467 U.S. at 769; *Weiss, supra.*, 745 F.2d at 813 & n.43. In such a situation, an officer or employee is legally capable of conspiring with the corporation for purposes of §1. *See, e.g., Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971).

Johnston, however, involved a conspiracy between a non-employee and an employee and a finding by the Court that the defendants had independent personal reasons for achieving the corporation's objectives. *Id.* at 426-27. The present situation involves only *one* alleged employee or corporate officer. Therefore, the Third Circuit in *Johnston*, also did not need to address the precise issue here, *i.e.*, whether one individual employee or officer may be the corporation's sole co-conspirator.

Moreover, in the cases which have found that officers or employees have been legally capable of conspiring with the corporation, courts have found that the employees have acted for their own interest and outside the interest of the corporation. *See, e.g., Weiss, supra.*, 745 F.2d at 813 & n.43. That is, the employee has acted outside the scope of his employment to further an

objective mutually beneficial to himself and the corporation. *See Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1971).

Here, petitioner asserts that respondent Amster acted on behalf of respondent Delaware Valley. As Chairman of the Department of Surgery and Chief of the Division of Orthopedic Surgery, respondent Amster was required, pursuant to the Medical Staff By-Laws (A. 259) to "develop and implement departmental programs" for "privileges delineation." Pursuant to said by-laws, respondent Amster developed and implemented, subsequent to receiving Board approval, rules and regulations governing inclusion on the emergency room rotation list (A. 322).

Importantly, noticeably absent from the record is even the slightest indication or argument that the criteria allegedly developed by respondents Amster and Delaware Valley, allegedly the product of improper motives, were in any way, shape or manner, improper, illegal or anti-competitive. On the contrary, the criteria were pro-competitive and, as the Third Circuit duly noted, the criteria were "objective" and focused on issues that were "obviously a matter of serious concern" to respondent Delaware Valley.

Even assuming *arguendo,* that respondents were legally capable of conspiring together, the facts of this action preclude such a determination. Those cases which have recognized that employees acting for their own interests and outside the interests of the corporation may legally conspire with the corporation are factually distinguishable from the present situation. In the cited cases, the employee, while acting outside the scope of his employment, has been pursuing his own economic interests *as well as* those of the corporation. Here, respondent Amster's actions, all allegedly outside of his interests in his capacity as an employee or officer at respondent Delaware Valley, are allegedly *adverse* to the best interests of respondent Delaware Valley (A. 13,

para. 31). This situation is irreconcilable with the definition of a conspiracy.

A conspiracy or combination must include a "meeting of the minds" in an "unlawful arrangement." *A.M. Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946); *H&B Equipment Co. v. National Harvester,* 577 F.2d 239, 245 (5th Cir. 1978). Thus, even if petitioner's allegations that respondent Amster was motivated solely by his own personal desires are accepted as true, there can be no conspiracy because there was no meeting of the minds between the respondents. Petitioner in his Complaint admits that "Defendant Amster as a corporate officer and/or employee acted contrary to the interests of defendant Delaware Valley by denying Plaintiff Cooper access to emergency room privileges." (A. 13, para. 31). Therefore, respondent, Delaware Valley could not logically conspire with another against its own self-interest. Since petitioner readily admits that the acts alleged of respondent Amster were contrary to the interests of respondent Delaware Valley, there could have been no meeting of the minds between respondents, such that an essential element in the definition of conspiracy is lacking.

Petitioner has failed to allege or provide any facts that would show a plausible motive for respondent Delaware Valley to enter into a conspiracy. To the contrary, respondent Delaware Valley would have every incentive *not* to engage in a conspiracy to protect the financial position of a member of its staff, for the likely effect would be to generate losses for respondent with no corresponding gains. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1361 (1986).

Finally, assuming *arguendo* that petitioner did allege a plausible motive for respondent Delaware Valley to enter into a conspiracy, without more, petitioner cannot sustain a viable §1 cause of action.

2. Petitioner Has Not and Cannot Establish Any Adverse, Anti-Competitive Effects Within The Relevant Markets

Petitioner has also failed to establish a genuine issue of material fact as to the requirement of a restraint of trade. Although the literal language of §1 of the Sherman Act declares "every" contract, combination or conspiracy in restraint of trade to be illegal, courts have held that the Sherman Act proscribes only unreasonable or undue restraints of trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60-62 (1911); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979). A challenged activity which appears on its face to restrain trade, must be examined for its purpose, scope and effect to determine whether the agreement merely regulates and promotes competition, or supresses and thus, destroys competition. *See Board of Trade of Chicago v. United States*, 246 U.S. 231, 238-40 (1918).

In determining whether a challenged activity constitutes an unreasonable restraint of trade, courts engage in two different legal analyses: the *per se* analysis and the rule of reason analysis. The *per se* analysis applies to certain types of anti-competitive conduct because of their pernicious effect on commerce and lack of any redeeming value. For these types of conduct, an adverse effect on competition is presumed. *See Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) Courts have held that practices such as price fixing, division of markets, group boycotts and tying arrangements may constitute *per se* violations of §1 of Sherman Antitrust Act. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-48 (1982). Although the petitioner, in his Complaint, did allege a *per se* violation of the Sherman Antitrust Act (A. 13, para. 33), decisions of numerous federal courts show that the rule of reason analysis should apply.

The "rule of reason" analysis applies if the challenged activity's effect on competition can only be evaluated by analyzing facts peculiar to the business, the history of the restraint, and the reasons for its imposition. *See Nat'l. Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). In analyzing a claim of restraint of trade under the rule of reason analysis, the fact finder must weigh all of the procompetitive benefits against the anti-competitive effects of the challenged activity to determine whether that activity is an unreasonable restraint of trade. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Courts agree that generally the rule of reason analysis should be applied to antitrust cases in the health care setting. In *Weiss v. York Hospital*, 745 F. 2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the Third Circuit applied a *per se* analysis to the antitrust claims of a class of osteopathic physicians based upon the denial of staff privileges at a hospital. The Court, however, reasoned that the hospital's actions constituted a group boycott, which is *per se* illegal under §1 of the Sherman Antitrust Act. *See United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966).

The *Weiss* Court, however, recognized that in staff privilege cases that implicate the degree of professional ability, the rule of reason analysis should apply. *See, Weiss, supra.*, 745 F.2d at 820-22. *See also, Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988). In addition, application of the *per se* analysis is inappropriate when a plaintiff cannot show that the *sole* reason for the defendant's actions was to control his access to the market place. *See Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Friedman v. Delaware County Memorial Hospital*, 672 F. Supp. 171, 189-90 (E.D. Pa. 1987), *aff'd.*, 849 F.2d 600 (3d Cir. 1988) (*per se* analysis inappropriate because physician's dismissal from hospital staff may be based upon motive to promote quality medical care and not solely to deny plaintiff access to marketplace).

The criteria for scrutinizing the legality of a restraint of trade under the rule of reason was articulated by Justice Brandeis in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918):

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.* To determine that question, the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238 (emphasis added).

Although the United States Court of Appeals for the Third Circuit, in its Opinion, did not articulate the standard that it applied in determining that petitioner did not have a viable cause of action under the Sherman Antitrust Act, the Court's reasoning is consistent with the rule of reason analysis. The Court reasoned that the challenged restraint, objective criteria determining the eligibility of practitioners for inclusion on the emergency room rotation roster, was based upon the competency of physicians, a matter of serious concern to respondent Delaware Valley and was therefore reasonable.

The rule of reason analysis and not the *per se* analysis is appropriate in this case inasmuch as the criteria implicate the issue of physician competence and have a pro-competitive purpose and effect.

In this case, the alleged restraint of trade consists of objective criteria determining the eligibility of practitioners for inclusion on the emergency room rotation roster. The criteria consist of the following:

1. Completion of an AOA approved internship and an AOA approved residency;

2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;

3. Status as an active staff physician for at least three (3) years; and,

4. Admission to the Orthopedic service of at least 50 patients per year from the physician's practice.

(A.322, 325). Petitioner does not contend that he satisfies these four criteria, nor does he challenge the legitimacy of the criteria. Moreover, the United States Court of Appeals for the Third Circuit held that these criteria did not constitute an unreasonable restraint of trade. The Court stated:

> The hospital has adopted objective criteria governing the eligibility of physicians for the referral list. Because these standards focus on the doctors' years of experience and practice, they are relevant to professional competence, obviously a matter of serious concern to the hospital which could be held liable for negligently referring a patient to an incompetent staff member. As the District Court found, Plaintiff was neither singled out for special treatment, "nor has he pointed to anything which suggests that [the criteria do not express] a perfectly legitimate and reasonable policy." We conclude that the Hospital's policy does not violate the antitrust laws.

(Petitioner's Appendix at p. A-7).

Petitioner contends that the criteria nonetheless constitute an unreasonable restraint of trade because they were allegedly formulated and applied based upon an improper and anti-competitive motivation. Petitioner cites four cases to support his proposition that an alleged

anti-competitive motivation *alone* may constitute a violation of §1 of the Sherman Antitrust Act. These cases are entirely inapposite to the instant case and are quoted out of context. Specifically, none of the four cases cited involved objective criteria that were facially pro-competitive and related to a reasonable hospital policy. Moreover, none involved application of such criteria for the limited purpose of qualifying a physician for a referral rotation list, as opposed to staff privileges in their entirety.

In *Williams v. Kleaveland*, 534 F. Supp. 912 (W.D. Mich. 1981), a hospital revoked the staff privileges of a physician based upon its determination that his medical care was substandard. The Plaintiff contended that there was no serious question of his performance or competence, but rather the charges against him were merely a pretext to eliminate him as a competitor because of his intention to establish a health maintenance organization, which would compete with the hospital. *Id.* at 918.

Petitioner cites *Williams* for the proposition that "even where the good faith standards established by the hospital must be presumed it is still a relevant issue as to whether or not the individual doctors applying the standards acted for illegal purposes." On the contrary, *Williams* actually involves the issue of the propriety of summary judgment when it is not clear that the standards were applied at all. The *Williams* Court noted that it had to presume the good faith of the members of the Peer Review Committee that revoked the plaintiff's privileges and held that the plaintiff bears the burden of proving that the Committee's physician-members acted with and anti-competitive motive and not to maintain the legitimate standards of the hospital.

In the instant case, petitioner does not contend that the standards of the respondent medical center were not applied, but rather asserts that the adoption of those

facially legitimate and reasonable standards was based upon anti-competitive motive.

Similarly, in *Pontius v. Childrens' Hospital*, 552 F. Supp. 1352, 1372 (W.D. Pa. 1982), a physician contended that the hospital's decision not to retain him on staff constituted an unreasonable restraint of trade. Again, the Court was faced with the situation whereby it was required to determine whether the decision regarding the plaintiff's staff privileges was based upon legitimate standards of medical practice or solely for anti-competitive motives. Where the standards are not objective written criteria, as are those in this case, a court must determine whether the standards are reasonable and whether they were actually applied.

Again, in *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), the Third Circuit Court of Appeals was required to determine whether a physician's staff privileges were terminated based upon hospital standards or anti-competitive motives. The court held that the District Court erred, as a matter of law, in applying the administrative law standard of review — analyzing whether the hospital's decision was based upon "substantial evidence" — as opposed to the standard of review for Motions for Summary Judgment — analyzing whether the plaintiff had established any genuine issue of material fact as to the grounds for the termination of his privileges. This issue is not presented here.

The Court then exercised its powers of plenary review and determined that the plaintiff had raised a substantial issue of fact regarding whether the hospital's decision to revoke his privileges was based on his incompetence or on anti-competitive motives. *Miller* has no relevance to this case where there is no question of fact as to the reasonableness and the application of the criteria at issue.

Petitioner asserts that this Court's recent decision of *Patrick v. Burget*, 108 S.Ct. 1658 (1988), stands for the proposition that a plaintiff has stated a cause of action for

violation of the antitrust laws when he has pleaded "that there has been an improper and anti-competitive motivation for criteria, standards, regulations or actions of hospitals which appear, on their face, to be embodiments of legitimate and reasonable policies." Petitioner asserts that the decision in *Patrick* is dispositive of this case. Unfortunately for petitioner, however, the *Patrick* decision does not stand for this proposition at all.

The Supreme Court's decision in *Patrick* was confined to determining whether the *Parker* State Action Doctrine protected the peer review activities of a hospital and state Board of Medical Examiners from antitrust challenge. Nowhere in the *Patrick* opinion does the Court discuss, much less decide, the validity of the plaintiff's cause of action for violation of the antitrust laws. Thus, petitioner's broad statement that the decision of the United States Court of Appeals for the Third Circuit in the instant case is in conflict with *Patrick* is in error.

Furthermore, the facts of the *Patrick* case are distinguishable from those of the instant case for the same reasons as the other three cases petitioner cites. The plaintiff in *Patrick* challenged a peer review decision that was not based upon objective, written criteria. Thus, the pertinent antitrust analysis required a determination of whether the decision to revoke the plaintiff's privileges was based upon health care standards or was based upon an anti-competitive motive. In this case, there is no issue as to the legitimacy of the criteria, which have not been challenged, and there is no issue as to whether the criteria were applied. The *Patrick* decision is entirely inapposite to the instant case.

Thus, these decisions simply do not stand for the broad proposition for which petitioner cites them. Moreover, it is well-established that mere anti-competitive intent is not sufficient to sustain an antitrust cause of action. A plaintiff must satisfy the other essential elements of this claim. *See O.S.C. Corp. v. Apple Computer,*

Inc., 792 F.2d 1464 (9th Cir. 1986); *SI Handling Systems, Inc. v. Heisley*, 658 F. Supp. 362 (E.D. Pa. 1986); *Stone v. William Beaumont Hospital*, 1983-2 Trade Cas. (CCH) ¶ 65,681 (Oct. 18, 1983).

Moreover, to be unreasonable, the restraint must not only injure the petitioner but must also unreasonably restrain competition. *See Jefferson Parish District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). As this Court has emphasized on numerous occasions, the antitrust laws were enacted for "protection of competition, not competitors." *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S.Ct. 690, 697 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 297, 320 (1962). Injury to a plaintiff is *not* enough to prove injury to competition. *See O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469 (9th Cir. 1986). Petitioner simply has not and cannot establish an injury to competition generally. The Complaint and the Record are devoid of *any* scintilla of evidence or even facts or allegations of such injury to competition. Indeed, petitioner's Petition for a Writ of Certiorari to this Court does not even mention the requirement much less attempt to argue that it is satisfied.

In short, in this case, the criteria do not impose any injury on competition generally. Rather, as was recognized by the Court of Appeals for the Third Circuit, the criteria are relevant to professional competence and reasonable, and, if anything, are *pro-competitive*, permitting a hospital to better compete in the health care market. Thus, the criteria do not constitute an unreasonable restraint of trade in violation of the Sherman Antitrust Act.

3. Petitioner Has Not and Cannot Establish The Existence of an Antitrust Injury

Petitioner has also failed to establish an antitrust injury cognizable under the Sherman Antitrust Act. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S.

477, 489 (1977), the United States Supreme Court observed that a plaintiff,

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and which flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (citing *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 125 (1969)).

To survive a Motion for Summary Judgment in a private antitrust action, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable injury. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1355-56 (1986). The plaintiff must have evidence to support his claim. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2554 (1986). Petitioner has failed to show any injury cognizable under the Sherman Antitrust Act. The United States District Court for the Eastern District of Pennsylvania in its Memorandum Opinion emphasized that petitioner has not sustained any injury by virtue of the allegedly anticompetitive conduct of the respondents. The Court stated:

> This action is frivolous because plaintiff is not being precluded from doing anything by any of the defendants. He may find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital's facilities. The sole basis of

> his suit is that the hospital refers patients to other doctors, but does not refer patients to him. This is in keeping with the hospital's policy that it will not refer patients to a doctor who has been on its staff for less than five (5) years unless the doctor is associated with other qualified doctors. Plaintiff was not singled out for this treatment, nor has he pointed to anything which suggests that this is not a perfectly legitimate and reasonable policy. There is nothing in the law that requires the hospital to be his bird dog just because it is the bird dog for other doctors who have been associated with it for a longer period of time. Plaintiff may wish that the hospital would refer patients to him, but the Sherman Act does not require it to do so.

(Petitioners Appendix at p. A-1 — A-2). Petitioner did not challenge that portion of the District Court's Opinion and has failed to establish that there is a genuine issue of material fact as to whether any allegedly anti-competitive conduct of respondents caused him to suffer a cognizable injury.

For each of the reasons stated, petitioner has failed to establish the existence of any element essential to his case and upon which he must bear the burden of proof at trial. Thus, summary judgment was not only appropriate, but mandated. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986) (moving party is entitled to judgment as a matter of law because non-moving party failed to make a sufficient showing on an essential element of the case with respect to which she has burden of proof).

For each of the reasons stated, this Court should refrain from review of this matter.

CONCLUSION

The United States Court of Appeals for the Third Circuit correctly affirmed the District Court's decision to dismiss petitioner's Civil Action. Petitioner has not challenged the propriety and appropriateness of the legitimate criteria applied to determine the eligibility of a physician for inclusion on the emergency room rotation roster. Furthermore, by focusing on the use of experience and credentials of a physician, the criteria are designed to measure competency and are only procompetitive, enhancing the quality of services provided in respondent Delaware Valley's emergency room and enhancing respondent Delaware Valley's position within the health care market. Nowhere is it even suggested that any genuine issue of material fact exists regarding the legitimacy of the criteria for inclusion of a physician on the emergency room rotation roster.

The United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit appropriately considered and reviewed this case and properly determined that the petitioner should not be entitled to pursue the antitrust claim. Accordingly, this Honorable Court must deny petitioner's Petition for Certiorari.

Respectfully submitted,

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